BEFORE THE

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Federal Communications Commission

WASHINGTON, D. C.

Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

REPLY COMMENTS OF COMCAST CORPORATION

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INTRODUCTION

Comcast Corporation submits these Reply Comments with respect to the rate regulation aspects of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").

In its initial Comments, Comcast described five fundamental price-related aspects of the 1992 Act and its implementation:

1. Congress passed a pervasive rate regulatory scheme for basic cable service. Only a benchmark approach to regulating basic service will achieve the statutory objectives.

2. Congress also authorized the regulation of "subscriber" equipment used solely in connection with basic service on the basis of actual cost.

3. Congress did not authorize similar pervasive regulation of "cable programming service" -- the upper tier programming and equipment used to receive it. Rather, Congress authorized the FCC to establish a complaint process that enables review of cable rates in aggravated circumstances. Because Congress did not

intend to affect the overall rate levels of cable programming service, the only a priori measure the FCC may take is to establish a jurisdictional threshold above which it would entertain complaints.

4. Congress required the Commission to establish only maximum reasonable rates for leased access.

5. Congress chose to pass a measure that is unprecedented in regulatory form. The decision to do so presents the FCC with an imperative to proceed cautiously. The evident Congressional intent was to create a low cost basic tier without putting at risk the substantial, continuing improvements in other aspects of cable service that have coincided with cable deregulation. Given these circumstances, it is important for the Commission to be realistic about how much can be accomplished subject to the deadline pressure of the 1992 Act. The rate regulatory arrangements prescribed in the face of the April 3 deadline (a) must be regarded as provisional and (b) must not be excessively constraining. Rather, some time must elapse to permit cable operators to adjust to the requirements of the 1992 Act and to permit the government to assess with requisite care the basis for and consequences of specific price control alternatives.

* * *

Nothing we have seen in the initial Comments alters our view of the 1992 Act's requirements or of the Commission's obligations in connection with them. In fact, the great weight of the initial Comments agrees with the view expressed by Comcast. Our

Reply Comments thus are limited. They will address only certain material misapprehensions or mistakes that have arisen in the course of the initial Comments.

There is one other important preliminary matter. We are advised that the Commission expects to make available the pricing data it has gathered from cable companies pursuant to its cable rate survey. We believe that permitting any interested party access to this data is a very useful step. It will enable Comcast and others to attempt the kinds of quantitative analyses required to implement the concepts found in the legislation and discussed at length in Comcast's Comments.

I. EFFECTIVE COMPETITION

A. 15% Test Under Section 623(l)(1)(C) Should Be Met Cumulatively

The plain language of the 1992 Act, its legislative history, and underlying economic theory dictate that the 15% test of households served should be measured cumulatively.[1] However, the National Association of Telecommunications Officers and Advisors et al. ("NATOA") claims that the 15% test should not be met cumulatively.[2] NATOA cites a Conference Report statement as its primary authority for the assertion:

> "effective competition means ... the franchise areas [sic] is served by at least two unaffiliated multichannel video programming distributors offering comparable video programming to at least 50 percent of

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[1] See Comcast at 10-13; Consumer Federation of America ("CFA") at 114; Liberty Cable at 15.

[2] See NATOA at 10.

> the households in the franchise area, and at least 15 percent of the households in the franchise area subscribe to the smaller of these two systems ...

This constitutes somewhat less than a thin reed. It plainly cannot support the proposition NATOA advances. The language on which NATOA would rely plainly is a function of the assumption that there are only two multichannel distributors in the area. The Conference Report statement, even if taken literally, applies only to franchise areas that have two competing multichannel video programmers -- "smaller of these two systems." Continuing to maintain NATOA's literalism, this statement is irrelevant in measuring cumulative competitive market penetration, because it applies to situations with at least three competing multichannel video programmers. For example, in a franchise area with a cable system, DBS provider, and MMDS provider, one would calculate the cumulative market share of the MMDS and DBS to see if it is 15% or higher. This method of measurement corresponds not only with the statutory requirement but also with general usage in efforts to estimate levels of competition. For example, NATOA's logic would conclude that a cable operator with 58% of the market is not be subject to "effective competition" because the other 42% of the market is made up of three other multichannel providers each with 14% of the market. The Herfindahl-Hirschman Index, widely employed by the antitrust authorities, would find this a more desirable result than an 85%-15% marketplace split, which NATOA concedes would qualify as "effective competition."

B. There Should Be No Minimum Requirement For The Amount Of Programming Or Number Of Channels To Qualify An Entity As A Multichannel Video Program Distributor

NATOA suggests that in order to be classified as a "Multichannel Video Program Distributor," the entity would need to have at least 80% of the number of channels that the cable system has.[3] NATOA concedes that this is a "guesstimate." Although it is true the Commission has to occasionally promulgate rules by drawing a line somewhere, it is not necessary in this instance. An 80% or 50% or 20% line would ignore such changes in technology as video-on-demand and video dialtone that effectively will deliver vast quantities of programming over relatively few channels; it also ignores the probability that compression technology will affect the number of channels available to cable companies and other video facilities firms. In other words, in NATOA's proposed calculation very often the numerator will be meaningless and the denominator will be changing. Letting the marketplace decide will be sufficient. The percentage tests set forth in Section 623(l)(1) are sufficiently demanding -- if 15% penetration is met on a cumulative basis there is every reason to believe that the market is performing competitively regardless of the number of channels or quality of programming.[4]

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[3] NATOA at 13-14.

[4] The Commission should reject the notion that multiple dwelling units (MDUs) should only be counted as one billable customer for the definition of households. See NATOA at 16-17. Under this approach, SMATVs, which are the functional equivalent of franchise cable, could never qualify as competitors. This definitely is not the result Congress contemplated.

II. BASIC SERVICE TIER REGULATION

A. The Commission Cannot Grant Local Governments Authority Beyond That Which They Have Been Delegated Under State Law

NATOA argues that local authorities have the authority to regulate basic cable rates, without state authority, from the 1992 Cable Act and their inherent powers.[5] But, as we have shown, it is well settled that every power of a municipal corporation is derived from and depends upon state law[6] and Congress did not preempt state law through the Cable Act's basic rate regulation scheme.[7] Local authorities cannot claim that the 1992 Act enables municipal regulation of basic cable rates without the authority from their respective states. The Commission will have to deal with such issues on a case-by-case basis as part of the certification process. Comcast appreciates how difficult that process is likely to be.[8] But the Commission does not have the statutory ability to bestow sweeping municipal rate regulatory powers that NATOA seeks nor, on the basis of the cases NATOA cites, does it have any legal foundation even for agreeing with NATOA's thesis that inherent or implicit rate regulatory powers exist in the general case.

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[5] See NATOA at 29-30.

[6] See Southern Iowa Electric Co. v. Charlton, 255 U.S. 539 (1921).

[7] See Comcast at p. 17 n. 22.

[8] Comcast at 19.

B. The Commission Has Limited Jurisdiction To Regulate Basic Service Rates

The Commenters in the main agree that the Commission's authority to regulate basic service rates is strictly limited to those instances where the local franchising authority initially asserts jurisdiction and then fails to properly exercise that authority.[9] However, the Consumer Federation of America ("CFA") asserts that the Commission must regulate basic rates whenever a local franchise authority fails to do so.[10] This would apply even if the local franchise authority expressly notifies the Commission it does not want its cable system subject to basic rate regulation. In support of its assertion, CFA insists there was a "major compromise" with the language of Section 623. While this is true in the case of the conferees' granting the Commission flexibility in deciding the best methodology to regulate basic service rates,[11] Section 623(b)(6) -- Exercise Of Jurisdiction By Commission -- was not amended by the conferees.

In addition CFA cites the Senate's version of the 1992 Cable Act, S.12, and its legislative history as support for its proposition. The Senate was clear that it wanted the Commission to regulate the basic tier wherever local authorities failed to do so.[12] However, the Conference rejected the Senate provisions

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[9] See Continental at 13-15; Cox at 54-55; NCTA at 64-65.

[10] CFA at 123.

[11] See Conference Report at 62

[12] S.12, 102d Cong., 2d Sess. § 3(b)(1) (1992).

in favor of the House provisions. The Senate Report and statements of Senators on S.12 are simply irrelevant on this issue.

C. Franchising Authorities Should Not Be Allowed To Use Cost-Of-Service Regulation To Lower Prices Of Efficient Cable Systems

Some Commenters argue that the Commission should allow local franchise authorities to penalize cable operators for efficiency, by authorizing them to compel price reductions on basic service even though the price does not exceed the benchmark.[13] This is essentially the inverse of the Notice's proposal in n. 66 designed to address the constitutional issue of confiscatory rates. However, the prohibition on takings is a right -- it cannot be used as a pretext in the name of symmetry.[14] It is clear that any broadly applicable price control program will allow some efficient providers to receive a larger return than other providers. The point of regulation is to approximate an efficient outcome, not to cause all regulated firms to experience an identical return. Indeed, this recognition lies at the foundation of the Commission's effort to adopt price cap regulation for dominant common carriers. If the Commission allows subscribers or franchise authorities the power to attack efficient providers, it will introduce all of the perverse

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[13] See NAB at Appendix n. 10.

[14] Of course, there is a form of symmetry in any rate regulation scheme. Regulated firms are not allowed to raise their prices to a level the market would permit, but they cannot be compelled to lower their prices to a level that would be confiscatory.

incentives of cost-of-service regulation. It would encourage firms to raise costs to justify prices.

D. The National Association Of Broadcasters, The "Coalition", And The Consumer Federation Of America Have Not Proposed Workable Approaches To Rate Regulation

The National Association of Broadcasters ("NAB") and the City of Austin et al. "Coalition" offer the Commission wholly unworkable methods to regulate basic service rates. Under NAB's scheme, the Commission would create a benchmark to estimate a system's capital cost, as measured by replacement costs. Regulation of non-capital costs would be left to local franchise authorities. The Coalition's scheme is a "cost of service benchmark approach" that assertedly would apply to cable programming prices as well as basic prices. The Coalition's model appears to owe much from "bellwether" approaches to regulation.

Both approaches share a fatal flaw. They are, at base, cost-of-service regulation. Our initial Comments and those of many others (including, in places, NAB's) described the reasons why applications of cost-of-service regulation to the cable industry would not merely be inappropriate, but counterproductive. Both NAB and the Coalition badly underestimate the negative side effects of cost-of-service regulation and the cost and complexity of administering a cost-of-service program. It is harder than it looks to either NAB or the Coalition (although the sheer bulk of the Coalition's

appendices implicitly confesses some recognition on its part that the matter is not wholly straightforward).

The practical (as opposed to theoretical) workability of the proposals is discernible from the NAB submission itself. The "Technical Appendix" to NAB's Comments identifies the raw data used to calculate the $4.52 monthly basic fee that NAB tenders as an "example." The data not only are wrong, they are dramatically wrong. For example, the NAB estimates non-capital costs for Comcast's Philadelphia system, but divides the Philadelphia costs by an erroneous figure -- 2.5 million. There are 155,000 subscribers in Comcast's Philadelphia system, not 2.5 million as shown in the "Technical Appendix." Correcting this mistake alone changes the monthly per subscriber expense from $.69 to $11.20.[15] NAB made similar mistakes with the Falcon systems. It omits sales and administrative expense completely as if it does not exist, and then divides by an improper subscriber count.

CFA has proposed a "global formulaic" rate regulation scheme for basic service and cable programming services.[16] CFA's proposal is complex. It is not the "simple" approach Congress had specified for basic rate regulation. CFA's plan makes no allowance for either technological or programming improvements made over the last eight years although such advances are

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[15] $.69 does not cover the cost to prepare and send out a subscriber's bill; the postage alone is $.29.

[16] CFA appears to disregard any distinction Congress desired for the regulation of basic service and cable programming services.

undeniable. Far more troublesome, CFA has proposed a method of regulation of basic service tier channels and cable programming services that would impair the progressiveness of the industry. Rather than encourage the adoption of new technology and the presentation of increasingly diverse programming, CFA's proposal would create incentives for cable operators to reduce the quality and quantity of their programming. The CFA plan shares this defect with the Coalition's plan, but in some particulars is strikingly more perverse. Under certain assumptions, the CFA plan would give a cable operator an incentive not only to refrain from adding service, but to drop channels to retain revenues.

E. Implementation And Enforcement

As long as the Commission adopts a benchmark approach for basic service rate regulation, franchise authorities should have sixty days from the cable operator's initial notice to render a decision on an increase or it should automatically go into effect.[17] NATOA suggests that franchise authorities be given 240 days after being notified of a rate increase to render a decision.[18] The proposal is fundamentally inconsistent with NATOA's support of a benchmark approach.[19] That approach will allow franchise authorities to know promptly if their cable

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[17] See Comcast at 20.

[18] NATOA at 56-59.

[19] One wonders what time frame NATOA would deem adequate under a cost-of-service approach.

systems are proposing arguably unjustified rates; it should be as easy as checking the rate on a chart or matrix.

III. CABLE PROGRAMMING SERVICES

A. The Commission Cannot Give Local Franchise Authorities The Power To Review Cable Programming Services Complaints

NATOA recommends that the Commission delegate its authority to regulate cable programming services to local franchise authorities.[20] NATOA reasons that the delegation will reduce Commission burdens, provide subscriber convenience, and expedite the review of complaints.[21] Commission review of any local franchise decision would be based upon an arbitrary and capricious standard.[22]

There is no authority in the Act or in its legislative history to support this result. If Congress wanted to give local franchise authorities the power to review cable programming services it would have done so expressly as it did with the regulation of the basic tier.[23]

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[20] NATOA at 72.

[21] Id. at 72-73.

[22] Id. at 73.

[23] NATOA cites as authority for its proposition the Commission's plan to devise complaint procedures "that are not only fair to all parties, but are also simple and expeditious." NPRM at ¶ 98 (emphasis added). However, NATOA suggests a 300 day review period for franchise authorities to review and resolve cable programming services rate complaints.

B. Per Channel Offerings That Are Packaged Do Not Equal A Regulable "Tier"

NATOA and CFA argue that whenever premium or per-channel offerings are packaged, they become a regulable "tier."[24] Comcast reiterates its point that so long as subscribers retain the option to buy each of any packaged services on a per-channel basis there is no reason for the government to disturb marketing practices that lower consumers' costs.[25] The Commission should focus on substance not form -- Congress exempted per-channel offerings from rate regulation.[26] It is an illogical result that if you offer two unregulated services as a "package" they yield a regulated service.[27]

IV. EQUIPMENT

A. The Proper Focus Of Equipment Regulation is Narrow

NATOA and CFA argue that service level is irrelevant in deciding whether equipment should be regulated at "actual cost."[28] They argue that as long as any basic service signal passes through a piece of equipment, no matter what else is being received, it is regulated at "actual cost."[29] The consequence

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[24] See NATOA at 78-79 ; CFA at 136-138.

[25] See Comcast at 39-40.

[26] See Sections 623(b)(7) and 623(l)(1).

[27] The Commission only recently affirmed the pro-consumer benefits of packaging in Bundling of Cellular Premise Equipment and Cellular Service, 7 FCC Rcd. 4028 (1992).

[28] See NATOA at 48-49; CFA at 130-132.

[29] Id.

of this proposition is that only a piece of equipment that is solely used to receive upper tier programming would not be subject to "actual cost" regulation.[30] Comcast does not use any such equipment nor does it know of any actually used in the industry. Therefore, under the NATOA proposal, all equipment is subject to "actual cost" regulation. This result is not what Congress intended.

Congress intended Section 623 to create a low-cost basic service tier. To secure it, the 1992 Act establishes a regime of proactive regulation.[31] Congress perceived that as a subscriber moves beyond the basic service tier to cable programming services and then to premium programming, the governmental interest in regulating rates is limited in the first case and non-existent in the second case. There is every reason to believe that Congress did not sway from this stratification of governmental interest in regulating equipment.[32]

This approach also reflects sound policy because, as we have explained,[33] the Commission risks inadvertently biasing network

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[30] See NATOA at 49.

[31] See Comcast at 14-16.

[32] Comcast observes that in the case of customer changes, the same stratification does not exist; the statute commands that charges assessed for changes to or from the basic service tier, or changes subject to regulation under the "bad actor" provision be "based on the cost of such change." Section 623(b)(5)(C). However, the Commission must allow the operator to recover that not insubstantial expense of a customer change when such a change involves more than a "coded entry" into a computer.

[33] See Attachment to Comments of Comcast -- "Technology Considerations" by Mark Coblitz.

architecture if all equipment were subject to heavy handed "actual cost" regulation.[34]

B. Cable Operator Charges For Equipment, Installations, Additional Outlets, and Service Calls Should Be Weighed In A Reasonable Rate Pool

Comcast supports Time Warner's suggestion that the Commission should evaluate rates for equipment, installation, service calls, and additional outlets in a reasonable rate "pool."[35] Whether or not the various equipment components or services are bundled, the overall charges should be looked at as a whole when being scrutinized for reasonableness. As the Notice recognizes in ¶ 70, cable operators often price service installations below cost. In addition, as demonstrated by Exhibit 1 attached to the Comments of the City of Tallahassee, Florida, it is common for a cable system to shift quite regularly the contribution from different equipment components and related services. Studying the charts Tallahassee provides, there is no disputing the fact that different equipment items and related charges provide different levels of contribution. However, this

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[34] In addition, the Commission should not force operators to unbundle equipment charges. Commenters, including NATOA at 46-47 and the Attorney General, State of Connecticut at 11-12, argue that individual equipment items be completely unbundled. Comcast agrees with other commenters that there is no evidence in the 1992 Act or its legislative history to suggest that Congress intended to unbundle rates for individual equipment items. See Time Warner at 64-65.

[35] See Time Warner at 65.

is not evidence of overcharges.[36] Instead, it supports the proposition that to measure effectively the reasonableness of charges for equipment components and other services, the Commission must look at the charges as a whole to determine their reasonableness.

V. PROVISIONS APPLICABLE TO CABLE SERVICES GENERALLY

A. Any Authorization To Itemize Certain Imposed Costs On Subscriber Bills Is Permissive Not Mandatory

It is clear that any costs the Commission believes are warranted to be itemized on a subscriber's bill under Section 622(c) are clearly permissive and not mandatory. NATOA suggests a myriad of additional itemizations that cable operators will be required to itemize on their subscriber bills including "any other items a franchising authority believes are appropriate to itemize."[37] Comcast does not object to the Commission allowing additional itemizations to the items set forth in Section 622(c); Comcast in its Comments argue that retransmission consent fees should be allowed to be itemized.[38] However, the Act specifically states, "Each cable operator may identify ... each of the following ..." It would be a contravention of the section to require cable operators to itemize the enumerated items or any additional items the Commission thinks are warranted.

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[36] Increases are usually offset by decreases in other charges. For example, in 1993, there was a 40% increase in "Basic Expanded" installation but a 50% decrease in the price of "Limited Basic" installation.

[37] See NATOA at 91-93.

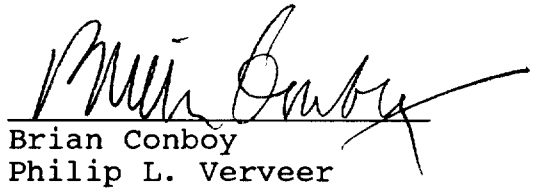
[38] Comcast at 58-63.

VI. LEASED COMMERCIAL ACCESS

A. Congress Did Not Impose A Requirement On Cable Operators To Provide Billing And Collection For Leased Access Providers

Fox and the Motion Picture Association of America ("MPAA") assert that billing and collection obligations should be imposed on cable operators. While Section 612(c)(4)(A) gives the Commission authority to regulate the terms and conditions of billing and collection when offered by cable operators, neither the Act nor its legislative history imposes an affirmative obligation to provide billing and collection services or subscriber information to leased access providers.[39] This should be left up to the individual negotiations between the parties. Neither Fox nor the MPAA have made a case that they or their members have unsuccessfully negotiated leased access agreements with cable operators.

Respectfully submitted,



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[39] See NYNEX Telephone Companies at 21 (arguing that cable operators be required to provide information to bill customers).